



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07087

Date and time of decision: 1 October 2019 16:22:00
M Simmons, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil, a Hindu and Sri Lankan national. On 9 December 2016 he lodged an application for a safe haven enterprise visa.
2. A delegate of the Minister for Immigration and Border Protection refused to grant that visa on 28 August 2019.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 20 September 2019 the applicant forwarded a letter dated 18 September 2019 which was prepared with assistance from [Organisation]. The letter notes the applicant would like to provide submissions in the response to the delegate's decision, but sets out various reasons why he cannot do so in compliance with the Practice Direction. He claims he was only made aware of the delegate's decision when the IAA advised that his matter had been referred to it on 3 September 2019, and that he only received a copy of the delegate's decision on 16 September 2019. The IAA acknowledgement letter, which contains information in his language, was sent to him by email and also posted to the same address cited in the letter to the IAA and listed on the department of immigration's refusal notification. The IAA acknowledgement letter sets out the timeframes for providing submissions and new information and encourages the applicant to act quickly as the IAA will seek to undertake its review efficiently. The applicant does not seem to have contacted the IAA between 3-16 September, despite being aware of the referral of his matter and having information before him about the IAA timeframes and the quick nature of the IAA review. The applicant claims that the delegate's decision is lengthy and he hasn't had opportunity to translate it, however he also suggests that the decision makes findings he has only just heard of for the first time. This suggests despite the length and lack of translation he has a degree of understanding of the delegate's reasons. He does not indicate what findings he has only heard of for the first time. I note that the only factual findings not accepted by the delegate were that the applicant was not targeted by Tamil separatist groups based on his own evidence at the interview, and that he was not targeted by the Sri Lankan authorities in connection to housing a group of teenage boys. The matter involving the boys was discussed with the applicant thoroughly at interview and he was put on notice of various concerns held by the delegate in respect of that issue. It is not apparent to me that any of the delegates findings concern issues that the applicant was not on notice of, nor has he identified any particular findings that came as a surprise to him. He also raises various concerns with the IAA process, including that it is not fair and reasonable and that due to the new information provisions the IAA is potentially missing country information relevant to his case. He does not set out what that information is. He refers to requiring access to the information before the IAA to prepare his submissions, however I note that an administrative release of information was actioned by the IAA on 17 September 2019 and that the released information was sent to the applicant's personal email address on that date. In these circumstances I am satisfied that this applicant has had a reasonable opportunity to provide any submissions or new information to the IAA. Noting on his own evidence it seems he was aware his matter had been referred to the IAA since around 3 September 2019.

5. The applicant further asserts that he should be afforded an opportunity to present his claims in person, and therefore that the IAA should schedule an oral hearing and failure to do so would cause the IAA to fall into error. The applicant has not stipulated what information he would seek to provide in an interview before the IAA beyond that general statement. Moreover, I note that around three weeks before his matter was referred to the IAA he attended an interview with the delegate where he was afforded an opportunity to discuss his protection claims in person in detail, and I have listened to a recording of that interview. In these circumstances I am not satisfied an interview before the IAA is warranted. Otherwise the letter makes no further requests of the IAA, nor does it seek to convey new information. I have considered its contents.
6. No further information has been obtained or received.

Applicant's claims for protection

7. The applicant's claims can be summarised as follows:
 - In the 1980s when the applicant was still a child his family were displaced due to fighting between various Tamil separatist groups and the Sri Lankan government. The applicant relocated to [Village], which is near to Mullaitivu, in 1983.
 - The applicant and his family can speak fluent Sinhalese because they previously resided in an area with a large Sinhalese population. This caused the Tamil separatist groups to be suspicious of them. The Sri Lankan Army (SLA) also harassed them, because of their language skills they thought the family would be able to pass them information about the separatist groups. Because they did not provide such information the SLA became suspicious of their allegiances. The army began to regularly interrogate the family because they suspected them of separatist involvement. To avoid this harassment the family moved to Negombo in 1986.
 - In Negombo, Tamils from other areas had to register with the local police. This was required because if there were ever any attacks the police and army wanted to know who was living where. The army would come regularly to check who was in their house and question them, a few times a week usually. It would happen at any time but especially if there were attacks in Colombo. When they came to check the occupants of the house they would physically intimidate the applicant and his family. This occurred between 1986 and 2009 when the war ended.
 - When the applicant was around [age] years old, members of the Criminal Investigation Department (CID) took him from his home and interrogated him, asking about his time residing in [Village] and whether he had any links to separatist groups. The authorities requested a bribe from his parents to secure the applicant's release. This happened a number of times.
 - On one occasion, he cannot recall when, the applicant was asked about a bombing and shooting attack on the international airport at Colombo for which the Liberation Tigers of Tamil Eelam (LTTE) claimed responsibility. They linked him to this attack because he made copies of his identity documents at a store where one of the attackers had purchased a sim card, and left over copies of his documents were found when that store was searched. After being questioned about the attack the applicant was released once it was established he had no involvement in the plot.
 - In approximately May 2011 the applicant travelled to [Village] to check on the family's land. While there he met some friends who asked the applicant to host their children in

Negombo so they could do some sightseeing. In October 2011 five of his friends' sons came to his home to stay. Members of the CID visited their home to ask about the guests. They took them to a police station and interviewed the applicant and the boys separately. The applicant had to pay a bribe to secure the release of the boys from the police. As they were leaving the station the CID were waiting for them outside, they re-detained them and interrogated them. The CID asked the applicant about the boys and their history, suspecting the group were planning trouble and that they had separatist allegiances. The applicant had to sign a document agreeing to be responsible for the boys. They were all released, then the boys left Negombo that night.

- In March 2012 the CID came to the applicant's house and took him to their office to interrogate him. His mother lodged a missing person report with the police on the same day. The CID asked him about the five boys and said they were suspicious, without explaining why. They released the applicant once he agreed to find the boys and bring them back. The applicant could not reach the boys or their fathers so he travelled to [Village] to find them. One of the boy's fathers told him that the boys had fled the country. He returned home and reported to the CID, telling them he could not find the boys. He said he would keep looking for the boys and bring them to them. The CID threatened him and said that he did not find the boys they would take the applicant to the fourth floor. The fourth floor is a place where people are taken for interrogations and tortured.
- In September 2012 the CID came to his house again. They told him that within two weeks he must produce all the five boys to their office. He told them he would find them. He later told the CID that the boys were living in different areas of Sri Lanka and that he needed more time to find them. The CID extended the time limit to find the boys until [October] 2012 and said that if the applicant could not produce the boys by this date then they would put him in jail. Because of this the applicant was very worried for his safety and decided to leave Sri Lanka. He organised his trip quickly and left the day before he was supposed to report to the CID.
- The fears harm due to his Tamil race and his imputed pro LTTE or other separatist group opinion. He will be targeted due to his previously dealings with the CID and for disobeying their orders to produce the five boys. His language skills previously made him a target of the Tamil separatist groups and the SLA who viewed him with suspicion due to his language abilities. He would be returning to Sri Lanka as a failed asylum seeker from a Western country who departed Sri Lanka illegally.

Factual findings

Identity and background

8. The applicant has provided evidence in support of his claimed identity and nationality including a Sri Lankan national identity card and birth certificate. The details of these documents generally align with his evidence in his visa application and at interview. I accept that the applicant's identity is as claimed. I am satisfied he is Tamil Hindu and that he was previously resident in Negombo. I accept that he is a Sri Lankan national and find that Sri Lanka is the receiving country for the purpose of this assessment.
9. The applicant has been consistent in his claim to speak Sinhalese. I accept he has been resident in areas that are predominantly Sinhalese, and I accept he is able to speak Sinhalese.

I also accept that this may have, on occasion, exposed them to attention from the authorities and separatist groups.

10. The applicant's account of the difficulties faced by his family in the 1980s has been reasonably consistent and is generally plausible in light of country information before me.¹ I accept that they experienced displacement due to conflict before moving to Negombo in 1986.

Harassment from authorities

11. The applicant claims that between 1986 and 2009 he and his family were frequently interrogated by the SLA and also the CID. He gave an example of an interrogation by the CID that occurred when he was [age] years old when he was held from around 7.30pm to 3.00am the next day. He was questioned about his prior residence in the Mullaitivu district and recent attacks in Colombo, and his father was required to pay a bribe to secure his release. I note that the applicant moved to Negombo in 1986, which is the year he would have turned [age], indicating this interrogation occurred within the first year of his residency in Negombo. He claims to have been interrogated on another occasion, around one and a half years after the first incident, when he was held for around three hours and when released when his mother's jewellery was offered as a bribe. He was subject to a further CID interrogation following a bombing and shooting attack on the international airport for which the LTTE claimed responsibility. The applicant cannot recall when this occurred, but he said he was not physically harmed and after it was determined he had no involvement with the attacks he was allowed to leave.
12. The applicant claims to have been interrogated on roughly a weekly basis for a period of over 20 years ending in 2009. He gave three examples of this. However two of the three examples he provided of specific instances where he was interrogated were from the 1980s. In relation to the third example, he could not recall when that interrogation occurred or even provide an estimate, despite knowing it was linked to an attack on the Colombo airport. I can accept that the applicant and his family were on occasion subjected harassment and interrogation, as I consider it plausible that they may have been viewed with some suspicion due to being Tamils who formerly resided in Mullaitivu. I can accept that the applicant may have been questioned by the authorities from time to time and that he may have been subjected to greater scrutiny following attacks by Tamil separatists. I have some doubts about his evidence regarding following the attack on the airport. That he was unable to be more specific about the airport attack itself causes me some doubt given he provided a very detailed account of why he was initially suspected of being involved in that attack, recounting the narrative of his copies of his documents were discovered during the police investigation. Given his personal connection to the matter, it seems unlikely to me that he would not know more about an attack he was initially accused of being involved in, such as approximately when it occurred or whether anyone died. In any event, according to the applicant's evidence, the authorities ultimately determined he had no involvement and ceased being a suspect
13. Moreover, I am not satisfied that the applicant was subjected to near weekly interrogation and harassment as claimed. I find this to be an embellishment. I accept the applicant was subjected to some harassment and interrogation, as I consider it plausible that the authorities were suspicious of a Tamil who formerly resided in Mullaitivu. However I do not find it plausible that the applicant would be of such sustained suspicion to the authorities

¹ See for example, UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

that they would harass and interrogate him at the frequency claimed, given his evidence that no one in his family had any association with any Tamil separatist groups. I am not satisfied their ethnicity, period of residency in Mullaitivu district, and Sinhalese language skills, would motivate the authorities to expose them to the level of interest claimed. Furthermore, that the applicant only provided three examples of this harassment, two of which were from the 1980s and the other which lacked detail, suggests to me he has exaggerated the nature and frequency of the harassment and interrogations. The applicant claims, and I accept, that the authorities ceased visiting his home to interrogate and harass him in 2009. As this is the year the LTTE were defeated,² I consider it plausible the authorities may have altered their approach to dealing with suspected Tamil separatists around that time.

Boys visiting from Mullaitivu

14. I do not consider the applicant's account regarding the incident with the five boys to be credible and I am not satisfied he is recounting a lived experience. I accept the applicant previously resided in Mullaitivu district, and I accept he returned there in 2011 to check on land owned by his family. I accept he may have met some acquaintances there who asked him to host their children in Negombo and that they subsequently visited later that year. However, I have various concerns regarding the events which the applicant claims flowed from the visit of the five boys to his home, as set out below, which leads me to conclude the boys' visit never triggered interest from the CID or police.
15. The account of the events triggered by the boys visits provided by the applicant at the interview with the delegate is markedly different to the version of events set out in his visa application. At the interview that applicant claimed that in October 2011 the boys came to Negombo and left after one day following CID and police questioning. After two weeks the CID came and asked the applicant to locate two of the boys for further inquiries. The applicant tried phoning them then decided to travel to Mullaitivu to locate them, but once he travelled to their village their family advised him that they had gone overseas. He then returned to Negombo, told the CID that the boys had gone overseas and they became angry and did not believe him. They told the applicant he had a further two weeks to produce the boys. After this the applicant left his home and was roaming around various places hiding from the CID for around six months. During this time the CID came to his home looking for him. So then he decided to leave Sri Lanka.
16. The visa application refers to the five boys visiting in October 2011. After they left Negombo, he claimed the CID first contacted him regarding the boys in March 2012, which is at odds with his evidence to the delegate that the CID contacted him two weeks after the boys' visit. He states that he went to the boys' village to try to find them after this March 2012 request, and when he could not locate them he returned to Negombo but did not tell the CID the boys had gone overseas, instead suggesting he would keep looking for them. This contradicts the evidence to the delegate that on returning from the boys' village he told the CID the boys were overseas. The visa application states that the CID made further requests for the applicant to produce the boys in at his home September 2012 and again in October 2012. It does not mention the applicant being in hiding for six months and moving around, as was claimed at the interview.
17. The visa application indicates all five boys were of interest to the CID. He states that in March 2012, around six months after the visit, the CID interrogated him and asked him about the five boys who visited, that they were suspicious of the boys and that they wanted him to

² DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

bring them back. He also states that in September 2012 they asked him to bring all five boys to the CID office. He offered a different narrative at the interview with the delegate. He claims that two weeks after he and the five boys were released, the CID indicated they were interested in two of the boys, who he named. He repeatedly told the delegate that the authorities were only interested in two boys. In his visa application he mentions the name of two of the boys, but one of the names is different to that provided by the applicant at interview as being of interest, and there is no indication in the visa application that only two were of interest to the authorities.

18. The applicant was asked by the delegate whether the CID explained why they were interested in the boys to which he replied they did not. He was also asked whether he had any idea what the CID wanted or why they were interested in the boys, to which he replied that the CID did not tell him anything, just that they had a problem regarding two of them and please bring them to the CID. I note that in the visa application he stated that the CID accused the boys of being members of separatist groups.
19. The applicant claims that in March 2012 the CID took him away to be interrogated, so his wife contacted his mother and on the same day his mother lodged a missing person report with the police. A copy of this report was provided with the visa application. It is unclear why the applicant's mother would report the applicant as missing to the police when she knew that he was being held in CID custody, which is a branch of the police. When the delegate asked why his mother obtained the report, the applicant responded that since he was not returning home his mother thought by making the report it could be brought into the view of a magistrate. There is no indication any court action was pursued. I note that the applicant claims to have been subjected to regular interrogations from the SLA and CID between 1986 and 2009, yet there is no indication or suggestion that any of these occasions a missing persons report was filed.
20. The contents of the police report also raise some doubts. It relevantly asserts that in March 2012, for the first time an unknown person came to his mother's house on a motor cycle. She told him the applicant was not at home and that she did not know where he was. Then the unknown person asked whether the applicant was helping the Tamil Tigers, to which she replied she did not know. The report also asserts that the applicant was residing in Negombo and working in Colombo, and that he comes home every two weeks. His mother states that she came to know from the neighbours that a group of people went to see her son in Colombo.
21. There is no mention of the CID or the boys from Mullaitivu in the police report. This is despite the applicant's assertions at the interview with the delegate that his wife and mother knew of the matter involving the five boys. The applicant did not suggest in his visa application or at the interview that an unknown person on a motorcycle approached his family home in March 2012 and accused him of helping the Tamil Tigers. He has only suggested that at that time he was facing difficulties arising from the five boys and the CID wanting him to locate them. That the mother's police report offers no corroboration of the claims regarding the five boys, and raises an event not mentioned elsewhere by the application causes me serious doubt as to its reliability. Furthermore, the contents of the police report conflict with aspects of the applicant's own evidence. His employment history set out in the visa application indicates he last worked in Colombo in 2005 and that from 2010 to 2012 he was working in Negombo as a security guard at a hotel and as a casual taxi driver. In contrast, his mother asserted to the police that in 2012 he was working in Colombo and only returned home every two weeks.

22. The applicant stated that in roughly 2013 his wife presented to their local Grama Sevaka office to lodge a document declaring that the applicant had left her and that she had no contact with him. This was to stop the CID from harassing her about the applicant. He indicated after lodging this document his wife had not had further difficulties. This is not mentioned in the 2016 visa application. In that application he claimed that his wife continues to be harassed by the CID at that time.
23. Having regard to the matters I am not satisfied that these events occurred. In addition I do not consider it plausible that the CID would ask the applicant to locate and produce the boys as claimed. The applicant has offered no corroborative material to support his assertion that the CID rely on or compel civilians to locate and produce persons for them. I do not consider it plausible that the CID would release the applicant and instruct him to locate the boys for them. The applicant himself asserts in his visa application that the Sri Lankan authorities and the CID would definitely be able to find him anywhere in Sri Lanka, indicating he believes the CID has national capabilities and the ability to locate individuals anywhere in Sri Lanka. It is difficult to believe they would not also be able to locate the boys themselves.
24. I do not accept that the visit by the five boys to Negombo resulted in any interest from the police or the CID, I find that those claims are entirely fabricated. I do not accept that the applicant has ever been of any adverse interest to the authorities for any reason related to the boys' visit.
25. In his 2016 visa application that applicant states he suffers from stress and depression which has impacted his memory. He also indicated he was arranging to see a counsellor. No evidence of him having consulted a counsellor or of any medical diagnosis has been provided. There was no suggestion from the applicant at the interview with the delegate that he was suffering from any impairment that impacted his ability to provide evidence or respond to the delegate's questions. I have taken into account these assertions, however on the limited information provided I am not satisfied that they overcome the various inconsistencies and concerns I have highlighted. Particularly given some derive from the police report prepared from his mother's testimony, which would not in any way be impacted by any memory issues experienced by the applicant personally. I find that the applicant has fabricated the claims regarding the events that purportedly flowed from the boys visit. I am not satisfied that the applicant was of any interest to the Sri Lankan authorities at the time of his departure from that country.

Unlawful departure, returning asylum seeker

26. I accept that the applicant left Sri Lanka by unofficial means as claimed, contrary to Sri Lankan law including the Immigrants and Emigrants Act 1949 (I&E Act). I am satisfied that the Sri Lankan government may assume that, due to his mode of departure, the applicant sought asylum from Sri Lanka in Australia.

Refugee assessment

27. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is

outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

28. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
29. Towards the end of the war and in the period following its 2009 conclusion, questioning of persons perceived as linked to the LTTE was relatively common, such as those living in or originating from LTTE-controlled areas.³ I accept the applicant's claims that he was questioned by the CID from time to time after moving to Negombo and that he attributes this attention, at least in part, to his being a Tamil who once resided in Mullativu. However I consider he has embellished the extent to which this questioning occurred. He claims, and I accept, that this harassment ended sometime in 2009. I have found above that he was not of any adverse interest to the authorities at the time he left Sri Lanka. Despite the regular interrogations the applicant has not indicated that he was ever held for longer than a day or that he was physically harmed. I note that no charges have ever been laid against him and that he was never referred for rehabilitation, suggesting the applicant was never perceived as having any separatist links of concern as country information indicates.⁴ It is now around ten years since the interrogations and harassment ended, and country information indicates the situation has changed considerably in Sri Lanka.⁵ I am not satisfied that this previous attention from the authorities is indicative of the treatment he may receive in Sri Lanka were he to return there in the foreseeable future.
30. Various sources suggest that the frequency human rights violations in Sri Lanka has declined significantly over recent years,⁶ although reports persist of continued abuses across Sri Lanka

³ Department of Immigration and Citizenship, "Sri Lanka: Situation for Tamils in the East and the North", 2 October 2008 LKA9471CQ; Department of Foreign Affairs and Trade (DFAT), "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

⁴ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826; US Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333.

including allegations of torture and abductions.⁷ Notwithstanding this, the material before me does not support a finding that Tamils currently face a real risk of harm in Sri Lanka solely on account of their race, religion or language. For instance the United Kingdom Home Office recently concluded that a person being of Tamil ethnicity would not in itself warrant international protection.⁸ Individuals identified as being in need of international protection include certain high profile Tamil separatist and political activists,⁹ which are not profiles the applicant has claimed to hold. The applicant has consistently stated he has no LTTE links or affiliation, other than his previous residency in formerly LTTE controlled Mullaitivu, and that his family never had any LTTE involvement and I accept that is the case. Country information does not support a finding that presently or in recent times Tamil ethnicity or identity of itself imputes LTTE membership or a pro-LTTE or Tamil separatist opinion, even when combined with other factors such as gender, age, occupation, or place of origin.¹⁰

31. The applicant indicated in his visa application he previously experienced harassment and threats from Tamil separatist groups in Sri Lanka because of his Sinhalese language abilities. On his account it seems that this treatment stopped after he relocated to Negombo in 1986. The delegate asked the applicant directly whether he currently has any fear of harm from any Tamil separatist groups were he to return to Sri Lanka, to which he replied he had no problem with such groups whatsoever.
32. The applicant claims his Sinhalese language skills also previously exposed him and his family to harassment from the authorities who sought to pressure them to provide information on Tamil separatist groups. The applicant has not suggested that since his departure from Sri Lanka nearly seven years ago any of his relatives who can speak Sinhalese have experienced adverse treatment or attention for that reason. The country information before me does not support a conclusion that Tamils who can speak Sinhalese are targeted for harm for that reason, or that such skills imputes them with a profile of interest. Sources including the United Kingdom Home Office and the Australian Department of Foreign Affairs and Trade indicate that being able to converse in more than one of the predominant languages in Sri Lanka is advantageous, including in when navigating bureaucracy and earning a living.¹¹
33. The material before me does not support a finding that a person with the applicant's background faces a real chance of harm in Sri Lanka because they requested asylum in another country. DFAT reports that between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka, including persons returned from the Australian community and immigration detention centres. Many others returned from the US, Canada, the UK and European countries, and most returnees are Tamil.¹² A UNHCR survey in 2015 of refugee returnees to Sri Lanka's North reported that 49 per cent of those surveyed had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. However, only 0.3 per cent of refugee returnees interviewed by UNHCR (including UNHCR-facilitated and voluntary returns) in 2016 indicated that they had security concerns

⁷ US Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333; International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275.

⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826;

¹⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826; US Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333.

¹¹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

following their return, and reports before me do it suggest returnees are routinely harmed during such visits.¹³ I find that the applicant will very likely return to Negombo, in Sri Lanka's west, where he resided for around three decades before his departure, and where his family continue to reside and own property. The reports on visits from the authorities are now a number of years old, and more recent information does not indicate that such visits continue to be prevalent there.¹⁴ Moreover the material before me refers to the authorities conducting post return visits in the North, and does not suggest they occur in the Western Province where the applicant will be returning to.

34. DFAT assesses that some returnees experience reintegration on return to Sri Lanka, but these are not due to failure to obtain asylum rather due to difficulties they may face finding employment and accommodation.¹⁵ Some asylum seekers also reported social stigma upon return including resentment of the financial support provided to returnees.¹⁶ However I note that the applicant continues to have familial contacts in Sri Lanka. He advised the delegate that his wife and children reside in a home and that is owned by his wife, purchased for her by her older sister. He has demonstrated a sound ability to obtain employment both in Sri Lanka and in Australia.
35. Considering the applicant's profile and history in light of the country information, I am not satisfied he faces a real chance of any harm in the foreseeable future for being a Tamil, his previous interactions with the Sri Lankan authorities, including the SLA, because he can speak Sinhalese, and his connection to formerly LTTE controlled Mullaitivu. I accept that as a returning asylum seeker the applicant may experience some stigma and some challenges reintegrating after his lengthy absence. However noting he continues to enjoy familial support, is educated and has shown a propensity to secure employment, I do not consider there is a real chance of such treatment amounting to serious harm for this applicant. There is not a real chance of serious harm to the applicant in the foreseeable future for being a returning asylum seeker.
36. Given his illegal departure, I accept the applicant may be arrested and charged, and that enquiries may be made about his departure and his activities while abroad. DFAT assesses that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during this processing. Notably, the most recent information from DFAT does not indicate the applicant would be detained in a prison while awaiting any court appearance. According to DFAT, returnees will be brought before the Magistrate's Court at the earliest opportunity but subject to magistrate availability, he or she may be detained for up to two days in an airport holding cell.¹⁷ The applicant would not be returning with an adverse profile that would be of interest to the authorities. There is nothing to suggest there would be extant criminal charges or proceedings against him. There is no indication that the applicant has engaged in any activities since leaving Sri Lanka that would be of any interest to the authorities were he to return to Sri Lanka.
37. Should the applicant plead guilty to departing illegally, he may be fined a penalty of up to LKR 200 000 and may then be free to go. There is no evidence to suggest the authorities will perceive the applicant as having been anything other than a mere passenger on the boat journey; according to the Sri Lankan Attorney-General's Department no custodial sentences

¹³ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

have ever been issued to such persons.¹⁸ If a not-guilty plea is entered usually a magistrate would grant bail either on the basis of personal surety or guarantee by a family member. I am not satisfied there is any reason the applicant would not be granted bail in the event he does plead not guilty (although he has not suggested as much). DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with court appearances, if required, over protracted lengths of time can be high.¹⁹

38. On the evidence I am not satisfied the applicant could not pay a fine, even if by instalment and manage arrangements for court appearances if further ones are required. I do not consider that questioning, any surety imposed or reporting conditions, the imposition of fines, or any other costs associated with the applicant's court appearances and possible short term detention would constitute serious harm in the present case, or that there is a real chance he will face serious harm during returnee processing, noting all returnees are subject to these standard procedures, regardless of ethnicity and religion²⁰.
39. The applicant does not have a real chance of serious harm for any reason were he to return to Sri Lanka in the foreseeable future. His fear of persecution is not well founded.

Refugee: conclusion

40. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

41. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

42. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
43. I accept that because of his illegal departure from Sri Lanka, the applicant may be subject to treatment including questioning, possibly detention of up two days in an airport holding cell and a monetary fine, and possibly associated courts costs. I accept the applicant may experience some stigma within his community as a returnee and some challenges re-integrating. However I note that he will be returning to Negombo where his family reside in a

¹⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

property they own, and there is no indication they would be unable to accommodate and support him. I am not satisfied the returnee processes or potential penalties he may face, or any such returnee stigma he may endure, together with having to re-establish himself, amount to significant harm in the relevant sense. I am not satisfied it would involve a real risk of the applicant being arbitrarily deprived of life, being subjected to the death penalty or tortured. Nor would any such treatment involve an intention to inflict pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or be intended to cause extreme humiliation, or otherwise amount to significant harm as defined in the Act.

44. I have found above that the applicant does not otherwise face a real chance of any harm for any reason advanced, including for reasons related to his ethnicity, language skills or ties to Mullaitivu or due to previous adverse attention from the authorities. The requirement for there to be a “real risk” of significant harm applies the same standard as the “real chance” test.²¹ For the same reasons as given above, I am not satisfied that there are substantial grounds for believing that, as a necessary consequence of the applicant’s removal to Sri Lanka, he will face a real risk of significant harm

Complementary protection: conclusion

45. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

²¹ *MIAC v SZQRB* (2013) 210 FCR 505.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.